Good afternoon Honourable Members

I would like to thank you for the opportunity to address you on this very important issue today. I am Zenande Booi the Lead Land Researcher at the Land and Accountability Research Centre based at UCT. The Land and Accountability Research Centre uses research, advocacy, and litigation, as well as partnerships and collaborations with various stakeholders with the aim of achieving the recognition and protection of rights in the former homeland areas.

Through our work we see illustrated daily the dire need for substantive progress in land reform efforts. The need for progress in the achievement of land reform to address continued injustices and relieve the desperation for land and security experienced by a majority of South Africans cannot be overstated. Unfortunately, as the Preamble of the Amendment Bill states, it is still the case that a majority of South Africans who bore the brunt of the injustice and indignity of arbitrary land dispossession during colonialism and apartheid continue to be palpably hungry for land – 27 years into our democratic dispensation.

The Amendment Bill we are considering today aims to make "explicit that which is implicit" in the Constitution – so that an amount of nil compensation is explicitly stated as a legitimate option for land reform purposes. In the context of the aim of the Amendment Bill I will deal with a single broad issue:

1. That the requirement, with the insertion of subsection (3A) in section 25 of the Constitution, that national legislation must set out the *"specific circumstances*" in which a court may determine that the compensation payable be nil, is likely to be an unconstitutional limitation of the power that the state has in terms of section 25, as it now stands, to constitutionally expropriate property for the purposes of land reform.

As the Constitution now stands, section 25(2)(b) provides, that expropriation that is done in terms of a law of general application for public use or in the public interest should be subject to compensation that is agreed to by the affected parties or decided or approved by a court of law.

The Amendment Bill seeks to insert an additional proviso in section 25(2)(b), this stipulation – which is articulated in the intended subsection (3A) – provides that compensation can be determined to be nil where expropriation is for the purposes of land reform.

However, this newly inserted subsection (3A) goes further than just 'explicitly' stating that compensation can be determined and confirmed as nil. In setting the constitutional parameters of expropriation with nil compensation, subsection (3A) requires that national legislation must set out the "***specific circumstances"*** in which it may be determine that the amount of compensation is nil.

Through the use of the phrase "specific circumstances" the ambit of the state's power to expropriate with nil compensation for the purposes of land reform is seriously limited by the Constitution itself. Also is a court's ability to exercise its constitutional function of adjudicating the provisions of the Constitution and carrying out the balancing act between the public interest and the interests of those affected by using the non-exhaustive list in subsection 3 of section 25 – this important function is effectively done away with.

Before the Joint Constitutional Review Committee, it was our submission that a proper reading of section 25 of the Constitution already allows for expropriation with nil compensation for the purposes of land reform, in a manner that is set out in legislation. We emphasised that one of the most important functions of section

25 is empowering the state to take action to promote land and related reforms that are aimed at reversing the injustices of our past.

The Bill of Rights as well as the rest of the Constitution aims to empower the state to enable it to achieve a society based on social justice and fundamental human rights. In South Africa's context an important aspect of achieving that is to ensure that the state is sufficiently empowered to legitimately make significant interventions in South Africa's existing distribution of wealth and property.

Land dispossession was at the centre of the injustices and indignities imposed on a majority of South Africans, achieving land reform is a fundamental aspect of beginning to create the society envisioned by our Constitution.

It is therefore important to ensure the state has full access to the powers given to it by our Constitution which are necessary to achieve a society that recognises and seeks to remedy the injustices of the past to ensure a brighter and dignified future for every South African.

But this current attempt at "making explicit that which is implicit in the Constitution" could severely curtail an important tool that the Constitution already makes available to the state to achieve land reform.

It is our contention that subsection (3A) would be an unconstitutional limitation of the power of the state to take necessary and constitutional steps to achieve land reform.

As mentioned before the phrase "specific circumstances" when referring to when compensation can amount to nil constitutes an internal limitation of the rights and powers in section 25 as they relate to achieving land reform with the use of the state's constitutional expropriation powers. This phrase, which seems to require an exhaustive list of circumstances in which the state can use its power to

expropriate with nil compensation, unreasonably limits the mechanisms available to the state to effectively achieve land reform.

Section 25(1), and other provisions in the Constitution, already provide sufficient limitations on the state's power to expropriate. Section 25(1) provides a negative procedural right not to be arbitrarily deprived of property. The rest of section 25 articulates the procedures and positive rights that allow for constitutionally compliant deprivation of property through amongst other things, requiring a law of general application and a balancing of rights and interests.

Before the current Expropriation Bill being considered by Parliament, no previous attempt had been made to articulate the state's post-apartheid powers of expropriation. The extent of the state's powers in terms of the Constitution, which we content already includes the power to expropriate land with nil compensation, has never been articulated or tested.

It is inappropriate to limit this power with an internal limitation as is proposed by the Amendment Bill as it stands. The Constitutional Court has made it clear that when giving content to constitutional rights and principles – and the power of the state to give effect to those rights – a purposive and generous approach must be used to ensure that the aims of our constitutional project are achieved.

When the state gives effect to a right in terms of legislation, it is able to legitimately limit that right through a law of general application in terms of section 36 of the Constitution. Section 36 is applicable to section 25 and thus an internal limitation in section 25 is not necessary.

Any limitation of the powers of the state to expropriate is better suited to being articulated in legislation, the reasonableness of which can be tested against section 25 and section 36 of the Constitution. Placing the limitation in the text of section 25 of the Constitution will prevent the testing of the ambit of this power

and the development of a rich jurisprudence relating to what "just and equitable" compensation looks like in varying contexts – including when nil compensation would be "just and equitable".

Starting from a narrow position in giving content to constitutional rights and powers when the objective is to give effect to those rights, is not a good idea. It eliminates the opportunity for any enabling legislation to use the full extent of state power currently available in terms of the Constitution. Put differently, a narrow empowering provision in the Constitution results in limited and restricted enabling legislation, less likely to serve the objects, spirit and purport of the Constitution.

All the Constitution needs to do is require that national legislation be passed that would not legalise arbitrary deprivation of property and that does not violate section 36 of the Constitution. Which the Constitution already does. What that legislation will look like needs to be left to Parliament to decide. If it decides that legislating a closed list of instances where expropriation with nil compensation is allowed, then Parliament can do that. As it has done with the current Expropriation Bill which is being drafted and passed in terms of section 25 as it currently stands.

Leaving section 25 as it is, allows the legitimacy of Parliament's decisions in that Expropriation Bill to be tested against the standard of an appropriately empowering section 25, as well as the standard of "just and equitable" (including the non-exhaustive factors listed in section 25(3)) and reasonableness in terms of section 36 of the Constitution.

The intended subsection (3A) as it stands, with this internal limitation, would prevent any substantive enquiry into the reasonableness of nil compensation in

circumstances that are not part of the closed list. Doing so takes away opportunities to explore and develop what is constitutionally permissible.

I will be happy to answer any questions from the Honourable members of the Committee. I again thank you for the opportunity to address you.